

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PETER H. McCALLION	:	DETERMINATION
	:	DTA NO. 809834
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioner, Peter H. McCallion, 2201 Maple Avenue, Peekskill, New York 10566, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 5, 1995 at 1:15 P.M., with all briefs to be submitted by September 14, 1995, which date began the six-month period for the issuance of this determination. Petitioner, appearing by Stern, Keiser, Panken & Wohl, LLP (Andrew I. Panken, Esq., of counsel), submitted a brief on July 3, 1995. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (Michael J. Glannon, Esq., of counsel), submitted a letter in lieu of its brief on August 14, 1995. Petitioner submitted a letter in lieu of a reply brief on August 28, 1995.

ISSUE

Whether there was a transfer on November 3, 1987 of a controlling interest in Indian Hill Associates, Inc. which is subject to real property transfer gains tax.

FINDINGS OF FACT

1. Petitioner, Peter H. McCallion, and seven other individuals formed a corporation known as Indian Hills Associates, Inc. (the "corporation"). Although no stock certificates were issued to the eight individuals, their respective shareholder interests in the corporation were as follows: petitioner -- 13 shares; Terence Gargan -- 4.25 shares; Frank Loomis -- 2.25 shares;

Gregory O'Neill -- 2.25 shares; William E. Fowler -- 2.00 shares; Richard DeLorenzo -- 2.00 shares; Kenneth McCallion -- 1.125 shares; and Bernard Persky -- 1.125 shares.

2. At the hearing, petitioner explained that the corporation was formed in the first half of 1987 as an S-corporation.

3. Petitioner was president and a director of the corporation; while the other two directors and officers of the corporation were Terence Gargan, treasurer and William E. Fowler, secretary.

4. Both petitioner and Terence Gargan acted as attorneys on behalf of the corporation and its shareholders.

5. On July 6, 1987, the corporation entered into a contract to purchase ("purchase contract") four parcels of real estate, totaling approximately 165 acres, located in Putnam and Westchester Counties, New York from Putnam Limited Partners ("Putnam") for \$3,425,000.00 (see, Division's Exhibit "L"). The closing was to take place on November 7, 1987. A deposit of \$300,000.00 was paid by the corporation when the contract was signed. According to paragraph 32 of the rider to the purchase contract, the \$300,000.00 payment was to be held in escrow, in an interest-bearing account, by Putnam's attorney John D. Bamonte, Esq. Paragraph 35 of the rider gave the corporation, as purchaser, the right to assign the contract without consent of the seller, Putnam.

6. The sole asset of the corporation was the purchase contract with Putnam.

7. The shareholders of the corporation decided to sell their shares to Andrew Lane ("Lane"). Lane was a real estate developer from Framingham, Massachusetts. A written agreement to acquire all of the corporation's interest in the purchase contract and to acquire all outstanding shares of the corporation was entered into on November 3, 1987 by the shareholders and Lane. The agreement was signed on behalf of the corporation by petitioner as both president and as attorney for the shareholders/sellers.

8. The Division's Exhibit "K" is the agreement ("agreement") between the shareholders of the corporation ("sellers") and Lane ("purchaser"). According to the terms of the agreement, the sellers

"in consideration of the sum of One Million Six Hundred Seventy Five Thousand Dollars (\$1,675,000.00) paid to the Sellers by the Purchaser as hereinafter provided, hereby convey, sell and assign to the Purchaser all their shares in the Corporation."

Paragraph 4 of the agreement sets forth the following terms of how the \$1,675,000.00 consideration was to be paid:

"a) Three Hundred Thousand Dollars (\$300,000.00) to be paid upon the signing of this agreement by certified or bank check, and held in escrow until released for payment no later than December 10, 1987;¹

"b) Seventy Five Thousand Dollars, payable by certified or bank check, at or prior to the delivery of the deed to the above-described premises by Putnam Limited Partners to the Corporation at the office of John D. Bamonte, 24 Ellis Place, Ossining, New York 10562, or at the address of the Corporation's lending institution, at 10:00 a.m. o'clock on November 7, 1987, or

on such other date or place as may mutually be agreed to by the Corporation and Putnam Limited Partners in writing; and

"c) One Million Three Hundred Thousand Dollars payable by an irrevocable letter of credit issued in favor of Peter H. McCallion, as attorney for the Sellers, for the account of the Purchaser, by Bankers' Trust or other bank acceptable to the Sellers. The letter of credit shall be obtained at the expense of the Purchaser. The letter of credit shall provide for payment of the principal amounts and accrued interest on the dates as follows:

"Three Hundred Fifty Thousand Dollars plus interest on January 4, 1988, on the receipt of land funding by a Bank after Jan. 1, 1988;²

"Three Hundred Fifty Thousand Dollars plus interest on July 1, 1988;

"Three Hundred Fifty Thousand Dollars plus interest on December 30, 1988;

"Two Hundred Fifty Thousand Dollars plus interest on June 30, 1989.

1

This term was modified and the handwritten changes were initialed by both petitioner and Lane.

2

The handwritten portion concerning the land funding was initialed by both petitioner and Lane.

"Said payment shall be made by Purchaser in favor of the Sellers from the funds obtained in the aforesaid manner.³ Receipt by Sellers of said letter of credit duly executed by Bankers' Trust or other bank acceptable to the Sellers shall be a condition of the performance of the Sellers' duties under the Agreement. The letter of credit shall be in a form acceptable to the Sellers. A copy of a form of a letter of credit acceptable to Sellers is attached to this Agreement as Schedule C. The letter of credit shall not be revocable by the Purchaser. The Purchaser shall provide that the term of the letter of credit shall run from November 4, 1987 to July 21, 1989. Payment under said letter of credit shall be made to Peter H. McCallion, as attorney, directly by the bank issuing said letter of credit. In the event the Purchaser receives any notice that affects or may affect said letter of credit, Purchaser shall notify Sellers immediately of such notice by mailing a certified letter to Peter H. McCallion, 2201 Maple Avenue, Peekskill, N.Y. 10566. Sellers will in such event be entitled to demand assurances of payment under said letter of credit satisfactory to them. In the event such assurances are

not received within ten days of demand, Sellers have the right to draw payment in full of the balance of the purchase price plus interest."

9. According to paragraph 5 of the agreement, the interest rate on the irrevocable letter of credit payments was to be 10% per annum, compounded quarterly and was to be paid on the dates the principal amounts were due.

10. The last term of the agreement, which is handwritten and has both petitioner and Lane's initials after it, follows:

"Sellers agree to accept payment from an escrow fund to be released by the bank funding the land purchase in lieu of a letter of credit."

11. During the hearing, petitioner stated that at the time the agreement was signed, the conditions precedent to the shareholders' obligation to transfer the shares did not occur. He stated that Lane did not obtain a letter of credit from a bank nor was an escrow fund established. In addition, the shareholders did not receive the \$300,000.00 down payment required by the agreement. According to petitioner, Lane did not pay any consideration at the time the agreement was signed (tr., p. 20).

12. The Division's Exhibit "B" is the Real Property Transfer Gains Tax Questionnaire - Transferor, Form TP-580 ("transferor questionnaire") which petitioner executed as president of the corporation. According to the transferor questionnaire, the corporation was transferring a 100% controlling interest in the corporation which had a contract to purchase real property

located in Indian Hill - Section 2.5, Town of Yorktown, Westchester County, New York and Indian Hill - Section 120, Block 3, Lots 18 and 19, Town of Putnam Valley, Putnam County, New York, on November 3, 1987 to transferee Andrew J. Lane. According to Schedule B of the transferor questionnaire, the gross consideration to be paid for the transfer by the transferee was \$4,800,000.00; the purchase price paid to acquire real property was \$3,425,000.00; allowable selling expenses were \$100,412.00 and the gain subject to tax was \$1,274,588.00, with an anticipated tax due of \$127,458.00.

The Division's Exhibit "M" is the letter dated November 18, 1987 which was submitted along with the transferor questionnaire. In this letter, petitioner wrote in pertinent part:

"The enclosed papers are submitted by me on behalf of all the former shareholders of Indian Hill Associates, Inc., who sold 100% of their interest in the corporation on 11/3/87 to Andrew J. Lane. The corporation's sole asset as of this date is a contract to purchase 165 acres from Putnam Limited Partners.

"We have received to date no cash from Mr. Lane, but will be receiving \$1,375,000.00 over the next twenty months, in addition to the return of our \$300,000.00 deposit. Mr. Lane will be closing on the property on December 4, 1987, at which time he will pay Putnam Limited Partners \$3,125,000.00, and the \$300,000.00 deposit will be released to the Seller."

Petitioner also identified the following selling expenses, listed on the transferor questionnaire to the date of the closing and "owed by former shareholders, not Lane": Legal expenses - Peter McCallion - \$78,000.00; Engineer - \$1,260.00; Site Planner - \$6,652.00; Appraiser - \$4,500.00 and Mortgage Broker - \$10,000.00.

13. The Division's Exhibit "C" is the Real Property Transfer Gains Tax Questionnaire - Transferee, Form TP-581 ("transferee questionnaire") which Mr. Lane executed. According to the transferee questionnaire, Mr. Lane was the transferee who was acquiring 100% controlling interest on November 3, 1987 for \$1,375,000.00 from transferors "Peter H. McCallion, Terence Gargan, Gregory O'Neill, Frank Loomis, Richard DeLorenzo, William Fowler, Kenneth McCallion and Bernard Persky (former shareholders of Indian Hill Associates, Inc.)". The location of the property to be transferred was Indian Hill - Section 2.5, Parcel 2, Town of Yorktown, Westchester County, New York and Indian Hill - Section 120, Block 3, Lots 18 and 19, Town of Putnam Valley, Putnam County, New York.

14. Petitioner's Exhibit "1" is a letter dated November 30, 1987, written by Andrew Lane to Terence Gargan, Esq.,⁴ in which Mr. Lane wrote:

"When I discussed the purchase of the stock of Indian Hills [sic] Associates, it was understood by the shareholders that I was doing so, solely that I might acquire the Indian Hill property from Putnam Limited Partners while preserving [sic] the rights of Indian Hill Associates vis-a-vis the Town of Putnam Valley. Repeated representations were made to me by the shareholder's [sic] that Banker's [sic] Trust of New York was prepared to finance the purchase of the property, and that the lender was prepared to go forward quickly. It was in reliance on these representations that I signed and delivered the November 3rd agreement with the shareholders. They were well aware that I had no intention to finance the purchase out of my own cash flow, and that, had I not been told of the ready financing, I would not have had an interest in the purchase of the stock of Indian Hills [sic] Associates.

"Since entering into the agreement with the stockholders, I have, as you know, learned that the representations concerning the availability of the purported financing package were, at best, less than accurate and misleading. I had been led to believe that Banker's [sic] Trust was looking to the land only as security for the loan.

"As you know, my discussions with Banker's [sic] Trust continue, but they have made it clear that if they make a loan, it will be a recourse transaction and that, therefore, there will be a period of evaluation before they decide whether to proceed. You are also aware that I have already sent the shareholders \$40,000 to be utilized in connection with their efforts, on my behalf, to acquire the additional Bayha parcel adjacent to the Weingarten property.

"I am, therefore, prepared to proceed alternatively:

1) If the Purchase and Sale Agreement with Putnam Limited Partners can be renegotiated so that Indian Hill Associates' obligations thereunder are contingent on obtaining financing and the agreement

is likewise clarified to reflect this financing contingency, I am prepared to pay the \$300,000 sum, together with the other sums due and payable, upon closing of the transaction. I would continue to use my best efforts to obtain financing and to close both transactions as quickly as possible after financing is obtained; or;

2) If your clients would prefer to pursue other opportunities with the prospective purchasers you mention in your letter, I am prepared to permit them to do so. They need simply to return to me the \$40,000 which I've sent them and I will execute whatever documents you reasonably deem advisable to evidence the release of my rights to acquire the stock of Indian Hill Associates.

"Please discuss this matter with your clients and advise as to their choice of options. Banker's [sic] Trust representatives will be in our office on Thursday, I am making every effort to obtain financing as quickly as possible."

⁴This letter references: "Indian Hill Associates, Your File No. 6048-1, Your letter dated November 23, 1987".

15. On December 1, 1987, the Division issued a Real Property Transfer Gains Tax Tentative Assessment and Return, Form TP-582 ("tentative assessment") to petitioner which contained the following computation:

1. Gain subject to tax as computed by the Transferor on Form TP-580, line 9	1,274,588.00
2. Net adjustments (see Form TP-582.1 attached)	14,500.00
3. Gain subject to tax (line 1 plus or minus line 2)	1,289,088.00
4. Tentative assessment of tax due (10% of line 3)	128,908.80
5. Penalty due	0.00
6. Interest due	0.00
7. Total (lines 4,5 and 6)	128,908.80
8. Amount Previously Paid	0.00
9. Total due (line 7 less line 8)	128,908.80

Attached to the tentative assessment was a "Schedule of Adjustment" which explained the adjustment made by the Division. According to this schedule, selling expenses, totaling \$14,500.00, claimed for the appraisal and the mortgage broker were disallowed

16. Andrew Lane proposed to amend the agreement. Mr. Lane sent a letter agreement ("letter agreement") dated January 4, 1988 to "The Shareholders of Indian Hills Associates, Inc.", in care of petitioner, which referenced the stock purchase agreement dated November 3, 1987 and the payment provisions set forth therein (Division's Exhibit "N"). According to this letter agreement, Lane had reached an agreement with Putnam to further extend the closing date under the purchase contract from January 4, 1988 to February 12, 1988

"in consideration of release from escrow for Putnam's account of the \$300,000 payment previously made by Indian Hills [sic] Associates, Inc. under the terms of the July 6, 1987 agreement, Lane's additional payment on account of the purchase price of \$360,000 to be made this date."

However, he was not prepared to make the additional payments unless the shareholders agreed inter alia to the following terms :

"(1) Shareholders agree to the release of the \$300,000 deposit amount held in escrow pursuant to the terms of the July 6, 1987 agreement for the account of Putnam.

"(2) Notwithstanding any contrary provisions in the November 3, 1987 Agreement, no payments on account of the \$1,675,000 purchase price of the shares shall be due and payable until such time as Lane is actually able to close a land loan and actually receives the proceeds of such land loan. At the closing and funding of such land loan, Lane will pay the shareholders \$375,000 on account of the \$1,675,000 purchase price. Ninety (90) days after the date of such land loan closing,

Lane will pay to shareholders an installment payment of \$350,000 together with interest; a second installment payment of \$350,000 together with interest shall be due and payable one hundred and eighty (180) days after the date of such closing. No additional payments shall be due and payable until Lane has obtained all necessary governmental approvals for a subdivision from the Town of Putnam Valley. Lane will pay the shareholders, within sixty (60) days after receipt of Town of Putnam Valley approvals (receipt of approvals shall mean receipt of a signed final zoning map from the planning board of the Town of Putnam Valley and the running of all applicable appeals periods so that the same are no longer subject to challenge by appeal) the balance of the purchase price, \$600,000, together with interest thereon. The outstanding balance of the \$1,675,000 purchase price will bear interest from the date of the land loan closing, until paid, at the rate of 10% per annum; no interest shall, however, be due and payable except upon loan funding as aforesaid. All references to an irrevocable letter of credit as set forth in the November 3, 1987 agreement are hereby deleted; all due dates for payment as set forth in the November 3, 1987 agreement are superceded hereby."

Petitioner accepted and signed this letter agreement as president of the corporation and as attorney in fact for the shareholders.

17. According to a letter dated February 2, 1988, written by Terence Gargan to David A. White, Esq.,⁵ Mr. Lane had obtained a loan commitment from Merchants Bank of Boston, which was to close on February 5, 1988, the proceeds of which were to be more than sufficient to consummate the land purchase which was to take place on February 12, 1988. Mr. Gargan wrote, in pertinent part, that:

"[p]ursuant to paragraph 2 of the Agreement between Andrew Lane and the shareholders of Indian Hill Associates, Inc., dated January 4, 1988, which supplements the parties' agreement of November 3, 1987, the shareholders are due an initial payment of \$375,000 at the closing and funding of the loan to be used to consummate the land purchase. Accordingly on February 5 this initial payment will be due and owing.

"Peter has conveyed to me your request that he, as President, and I, as Treasurer of Indian Hill Associates, Inc. submit our resignations to you as officers of the corporation. We will execute and deliver the requested resignations, in favor of Manuel Rabbitt, at the loan closing on February 5th simultaneously with the payment of \$375,000 by or on behalf of Mr. Lane, by certified check payable to Terence Gargan, as attorney. Please advise Peter or me in writing of the time and place of such loan closing and confirm that appropriate arrangements for such initial payment have been made." (Petitioner's Exhibit "3"; emphasis in original.)

18. Petitioner's Exhibit "4" is a letter, dated February 3, 1988, written by Terence Gargan, as attorney for the shareholders of the corporation to David A. White, Esq., in response

⁵Mr. White was retained to represent Andrew Lane and the corporation at the closing of title between Putnam and the corporation for the land purchase.

to Mr. White's proposed modification of the agreement between the shareholders of the corporation and Lane dated November 3, 1987 and January 4, 1988.⁶ Mr. Gargan proposed the following:

"[t]he shareholders of Indian Hill Associates, Inc. agree to accept payment on account of the \$1,675,000 purchase price of the shares of Indian Hill Associates, Inc. in the following manner:

"(1) A bank or certified check in the amount of \$375,000 made payable to Peter H. McCallion, as attorney, shall be paid at the closing of title between Indian Hill Associates, Inc. and Putnam Limited Partners as the down payment for the sale of the shares of Indian Hill Associates, Inc. to Andrew J. Lane. This closing shall occur on February 12, 1988 at 1:00 p.m. at the office of John Bamonte, Esq., 24 Ellis Place, Ossining, New York. Time is of the essence for such closing.

"(2) If Mr. Lane elects to refinance the indebtedness on the Indian Hill property which is the subject matter of the closing referred to above, then \$350,000 shall be paid by bank or certified check to Peter H. McCallion, as attorney, ninety (90) days after such refinancing. If Mr. Lane does not so refinance the indebtedness, the payment of said \$350,000 shall be made no later than July 1, 1988.

"(3) \$350,000 shall be paid one hundred eighty (180) days after refinancing, or in the event there is no refinancing, no later than October 1, 1988, by bank or certified check to Peter H. McCallion, as attorney.

"(4) The final and fourth payment in the sum of \$600,000 shall be paid by bank or certified check to Peter H. McCallion, as attorney, after final approval of a subdivision by the Town of Putnam Valley. Final approval includes the running of any appeals period subsequent to Planning Board approval of the subdivision plat.

"Interest shall be due at the rate of 10% per annum together with all payments of principal, as previously agreed from February 12, 1988.

"All other provisions of the contract between Andrew J. Lane and the shareholders of Indian Hill Associates, Inc. shall remain in effect."

An attorney for Mr. Lane agreed and accepted this proposal on Mr. Lane's behalf.⁷

19. On February 10, 1988, all eight shareholders of the corporation executed a document entitled "CONSENT OF SHAREHOLDERS" ("consent") by which they consented to sell all of the shares of the corporation to Lane

"in consideration of payment by Lane of \$1,675,000, to be paid as follows: \$375,000 on February 11, 1988; \$350,000 plus interest on the balance of the purchase price at

⁶Mr. White's proposed modifications are not part of the record.

⁷It is impossible to determine the name of the attorney who signed this proposal since his signature is somewhat illegible.

the rate of 10% per annum on or before July 1, 1988; \$350,000 plus interest on the balance of the purchase price at the rate of 10% per annum on or before October 1, 1988; \$600,000 plus interest on the balance of the purchase price at the rate of 10% per annum upon approval of a subdivision by the Planning Board of Putnam Valley, New York on a 135 acre property located on Indian Hill Road to be conveyed by Putnam Limited Partners to Indian Hill Associates, Inc. on February 11, 1988, approval meaning the running of all appeals periods applicable thereto." (Petitioner's Exhibit "6".)

The following acknowledgment appeared on the consent:

"Peter H. McCallion, being duly sworn, deposes and says that he is the President of Indian Hill Associates, Inc., the corporation referred to in the foregoing consent; that he is the custodian of the stock book of such corporation; that the persons who have subscribed to the foregoing consent are the owners upon the books of such corporation of the number of shares of stock therein set opposite their respective signatures to the foregoing consent, being at least two-thirds in amount of the capital stock of such corporation."

20. A special meeting of the board of directors of the corporation was held on February 10, 1988. Petitioner's Exhibit "7" is a copy of the minutes from that special meeting. Review of these corporate minutes reveals that as of the date of the special meeting, the shareholders had not received the down payment for the shares "as specified in the contract dated November 3, 1987." The minutes also reveal that the directors and officers were to resign their offices "as of the time of delivery" of Lane's bank check in the amount of \$375,000 to Peter H. McCallion. The minutes also state that:

"upon delivery of said down payment and said resignations, the sole shareholder of Indian Hill Associates, Inc. shall be Andrew J. Lane, who shall be then entitled to elect whichever directors and officers he chooses."

21. On February 11, 1988 the corporation closed on the purchase contract with Putnam and acquired title to the real property.

22. According to petitioner, the first payment of \$375,000.00 was received by the shareholders on February 11, 1988, at the closing, at which time the shares were transferred to Lane (tr., p. 22).

23. Petitioner's representative asked petitioner what transpired on February 11, 1988 which led him to believe that the transfer of shares closed on that date, his response was:

"[p]rior to that date all of the shareholders of Indian Hill Associates -- and I believe there were seven of them -- signed a consent to sell such shares. That was delivered to Mr. Lane's attorney at the closing on February 11, together with a

document whereby the officers and directors of Indian Hill Associates, who were myself, Mr. Gargan, Mr. Fowler, resigned as officers and directors of Indian Hills [sic] Associates. And we also delivered that document to Mr. Lane's attorney. At that time we received a \$375,000 check" (tr., p. 24).

24. According to petitioner, he brought a filled out stock certificate "ready to be signed" to the closing on February 11, 1988 (tr., p. 28). However, Mr. Lane's attorney David White indicated that the delivery of the shareholders' consent which transferred to Mr. Lane their equitable right to receive the actual stock certificates from the corporation was sufficient.

25. On February 11, 1988, petitioner filed with the Division the tentative assessment which had been previously issued to him. He also filed a Real Property Transfer Gains Tax Supplemental Return -- As completed by Transferor, Form TP-583 ("supplemental return") to elect to pay the gains tax in installments. The date of transfer listed on the supplemental return was November 3, 1987. Section B of the supplemental return is used if the actual cash received is less than or equal to the tax due. According to Section B, the amount of cash received was zero and the amount of tax deferred was \$128,908.80.

26. In response to correspondence from the Division, petitioner sent a letter to Sharon Drosky, Tax Technician (Division's Exhibit "O"). In this letter petitioner supplied the following information to Ms. Drosky:

"The shareholders of Indian Hill Associates, Inc. did not receive a purchase money mortgage from Andrew J. Lane when they sold him all the shares of the corporation on November 3, 1987.

"We have only Mr. Lane's promise to pay us the consideration. When we sold the corporation to Mr. Lane, we did not receive any portion of the consideration on the date of the transfer. That is why we have applied for treatment on the installment basis, and for a deferred payment plan.

"Mr. Lane purchased the shares in November, and closed on the property on February 11, 1988. The closing statement enclosed is that of Putnam Limited Partners, who sold the property to Indian Hill Associates, Inc. The purchase price to Putnam Limited Partners was \$3,425,000.

"Subsequent to the closing between the seller and purchaser of the real property, the former shareholders of Indian Hill Associates, Inc. received the return of their downpayment on the contract to purchase the property from Andrew J. Lane.

"The first installment of the profit due the former shareholders is to be paid by Lane no later than July 1, 1988. This installment is \$350,000. The second installment is to be paid by October 1, 1988, and is also \$350,000. The final

installment of \$600,000 is due when all approvals for a subdivision are received from the Town of Putnam Valley."

27. On April 1, 1988, petitioner sent Ms. Drosky a copy of the January 4, 1988 letter agreement (see, Division's Exhibit "P"). In the cover letter which accompanied the letter agreement, petitioner again reiterated that the former shareholders of the corporation sold Lane their shares in the corporation, not the real property itself and that there was no purchase money mortgage securing payment of the debt. He further stated that there was no closing statement of the former shareholders in connection with the transfer of the real property from Putnam to the corporation because the former shareholders were not a party to that transaction "having sold their interest in the contract to Andrew J. Lane on November 3, 1987."

28. By letter dated August 18, 1988, the Division notified petitioner that his election to pay the gains tax due in installments had been accepted as filed (Division's Exhibit "Q"). According to the letter, the installment term was for a period of not more than 3 years, and minimum annual payment due on or before each anniversary date was \$42,970.67. The "Anniversary/Closing Date" listed on the letter was November 3, 1987.

29. In July 1988, Lane made an installment payment of \$350,000 on account of his purchase of the shares of the corporation (tr., p. 22).

30. In November 1988, petitioner made a gains tax installment payment to the Division in the amount of \$42,970.67.

31. Lane did not make the installment payment of \$350,000 due on October 1, 1988 to the former shareholders of the corporation. Instead, he commenced litigation on or about October 18, 1988 against petitioner and the other former shareholders alleging a defense to payment.

32. No approval of a subdivision was ever granted.

33. Lane filed a petition in bankruptcy under Chapter 11 on March 24, 1989 in the U.S. Bankruptcy Court, District of Massachusetts. His bankruptcy estate included the real property located in Putnam and Westchester Counties.

34. Petitioner did not pay the second installment gains tax payment in November 1989. Rather, he filed a Claim For Refund of Real Property Transfer Gains Tax ("claim for refund") (Division's Exhibit "F") dated November 1, 1989, for tax paid in the amount of \$9,061.87 and the cancellation of the remaining installment balance of \$85,938.13. Included in the attachments to the claim for refund is a Form TP-583 supplemental return and a letter which states the basis for the claim for refund.

Petitioner computed the tax on the supplemental return as follows:

1. Gain subject to tax as computed by Department of Taxation and Finance on Form TP-582	\$1,289,088.00
ADJUSTMENTS BY TRANSFEROR	
2. Additions	
3. Subtractions	(\$950,000.00)
4. Net adjustments	(\$950,000.00)
5. Gains subject to tax	339,088.00
6. Tax due (10% of line 5)	\$33,908.80
7. Tax deferred	\$42,970.67(paid)
8. Balance due	\$0
9. Penalty due	
10. Interest due	
11. TOTAL DUE (add lines 8,9 and 10)	\$0

Review of the letter which accompanied the claim for refund reveals that the basis of petitioner's claim for refund was a reduction in consideration. In his letter, petitioner stated that he had amended the gains tax return to subtract both the \$600,000.00 of the purchase price which was due upon approval of a subdivision plan, as well as the \$350,000.00 installment payment which was due on October 1, 1988. He noted in his letter that Lane had failed to make the third payment of \$350,000 due on October 1, 1988 and had subsequently filed a petition in bankruptcy on March 24, 1989 in the U.S. Bankruptcy Court, District of Massachusetts. Petitioner also noted that even though the purchase contract required a final payment of \$600,000.00 to be made upon approval of a subdivision plan by the Town of Putnam Valley for the property which the corporation owned, Lane had not applied for any such approvals and based upon representations made by Lane to the former shareholders and to the Bankruptcy Court, it was unlikely that Lane would ever apply for such approvals.

Petitioner's explanation of how he arrived at the claim for refund figure of \$9,061.87

follows:

"The installment payment that I made in November, 1988 was for \$42,970.67. Based upon the amount received to date, \$425,000, minus the deductions previously allowed of \$85,912, which yields a taxable gain of \$339,088, the tax due is \$33,908.80."

"I have therefore made a claim for a refund of \$9,061.87, based upon the difference between the amount paid to date and the tax due."

It is noted that some of the exhibits referenced in the letter which accompanied the claim for refund are not part of the record (tr., pp. 46-51).

35. During the hearing, petitioner was asked by his representative to clarify how he computed the claim for refund. Petitioner explained that the total consideration they received was \$725,000.00 and that \$300,000.00 had been paid as a down payment. He stated that he believed the profit to be \$425,000.00 from which he subtracted the selling expenses allowed by the Division to arrive at the gain subject to the gains tax (tr., pp. 35- 36).

36. The Division, on March 8, 1990, denied petitioner's claim for refund in its entirety and notified petitioner of its determination in a refund denial letter written by James Johnston, a tax technician in the Real Property Transfer Tax Gains Tax section of the Audit Division. In this letter, Mr. Johnston stated the Division's position regarding petitioner's claim that he did not expect to receive \$950,000.00 originally claimed as consideration in the transfer. Mr. Johnston wrote, in pertinent part:

"In October 1988, the transferee, Mr. Andrew Lane, was required to pay claimant \$350,000 under the terms of the purchase agreement. Mr. Lane failed to make this payment and filed suit against claimant on October 14, 1988. Because this matter is, as yet, unresolved and no determination has been made with respect to the \$350,000 payment, this amount cannot, at this time, be treated as a reduction in consideration.

"The Department must take the same position concerning the payment of \$600,000 due upon subdivision approval. Although Mr. Lane filed a petition in bankruptcy, pursuant to which the subject property may be sold, his intent with respect to the property has not yet been clearly established. The \$600,000 payment shall be deemed consideration until such time as it is no longer possible for Mr. Lane to subdivide the property."

Mr. Johnston also notified petitioner that because he had failed to make the installment payment due in November of 1989, the entire unpaid balance of \$85,938.13 had been assessed in accordance with Tax Law § 1442.

37. The Division issued a Notice of Determination (Notice No. L-001537708-8), dated March 30, 1990, to petitioner asserting additional real property transfer gains tax due in the amount of \$85,938.13, plus interest of \$3,892.17 and penalties of \$15,468.85.

38. On July 10, 1990, the Bankruptcy Court approved the private sale of the real property to the mortgagee, Bankers Trust Company.

39. A Bureau of Conciliation and Mediation Services ("BCMS") conference was held on February 7, 1991. A Conciliation Order (CMS No. 106360), dated May 17, 1991, was issued which denied the request and sustained the statutory notice (L-001537708).

40. Petitioner filed a timely petition, dated August 7, 1991, which challenged the assessment of the additional real property transfer gains tax, plus penalties and interest and requested a refund of \$9,061.87 in tax. In addition, petitioner requested that a judgment of liability for counsel fees and expenses in an amount to be determined be granted pursuant to CPLR 8601. Petitioner alleged, inter alia, that the Division: (1) erroneously found that additional real property gains tax was due; and (2) erroneously found that no refund of real property gains tax paid was due in this matter. Petitioner asserts that no additional tax is due because of Lane's bankruptcy, and because the final installment payment of \$600,000.00 was contingent upon approval of a subdivision, a contingency which never occurred. He also contends that a refund of tax paid in the amount of \$9,061.27 should be granted.

41. On May 3, 1995 petitioner filed an amended claim for refund with the Division which requested a refund of the entire \$42,970.67 in tax paid. In this amended claim for refund, petitioner claims that the consideration received totalled \$725,000.00 and any additional consideration was "either (1) contingent upon a contingent event which never occurred or (2) a value properly resulting in the \$1,000,000 threshold not being exceeded". He further claims that the additional "consideration" consisted of unsecured promises to pay money and that those

promises were made by an individual purchaser who declared bankruptcy. The original amended claim for refund was submitted into the hearing record as Petitioner's Exhibit "8".

42. The Division's representative asked petitioner what the total consideration for the transfer was, his response was that "[t]here was a total consideration, non-contingent, of \$1,075,000, and a contingent consideration of \$600,000" (tr., pp. 43-44).

43. According to petitioner the stated non-contingent consideration of \$1,075,000.00 was based upon Lane's totally unsecured promise to pay. He also averred that the total consideration he actually received was only \$725,000.00; Lane never paid the additional \$350,000.00 (tr., p. 53).

44. At some point, Lane's reorganization plan was confirmed and he was discharged from all claims and all debts that arose before the confirmation date. The record is silent as to the confirmation date.

45. Petitioner stated that the time for any appeal of the Bankruptcy Court's ruling has expired and that he has no chance of receiving anything more than \$725,000.00 from Lane (tr., p. 33).

SUMMARY OF THE PARTIES' POSITIONS

46. Petitioner contends that the shares in the corporation were transferred to Lane on February 11, 1988 pursuant to the terms of the November 3, 1987 agreement as amended by the January 4, 1988 letter agreement. He contends that the contract as modified provided that \$600,000.00 of the stated consideration of \$1,675,000.00 was contingent upon Lane's obtaining all necessary governmental approvals for a subdivision from the Town of Putnam Valley. Petitioner maintains that Lane never obtained the necessary approvals. In addition, he asserts that the \$350,000.00 scheduled payment which Lane never made and the contingent promise to pay \$600,000.00 were unsecured promises to pay money in the future which was never paid. Petitioner contends that he received only \$725,000.00 and that the additional consideration totaling \$950,000.00 were unsecured promises to pay which were worthless once Lane was

discharged as a bankrupt. He also contends that the consideration for the transfer was less than \$1,000,000.00 and is therefore exempt from the real property transfer gains tax.

47. Petitioner requests that the amended claim for refund be approved and the notice of deficiency should be cancelled in its entirety.

The Division asserts that a transfer of shares in the corporation to Lane occurred on November 3, 1987, and that the transfer is subject to the gains tax. It further contends that the November 3, 1987 agreement did not contain any contingencies concerning payment of any portion of the stated consideration. The Division argues that the terms of the November 3, 1987 agreement control in this case since the transfer took place on that date. It maintains that consideration is set at the time of the transfer and subsequent modifications do not alter the consideration.

In its brief, the Division does concede that "if it is found that the transfer occurred on February 11, 1988 subject to the \$600,00.00 subdivision approval contingency then petitioner is entitled to a reduction in consideration in the amount of \$600,000.00" (Division's letter brief, p. 2). However, it argues that petitioner would not be entitled to any further reduction in consideration for the \$350,000.00 not paid by Lane.

The Division requests that the petition be denied and that the notice of determination be sustained.

CONCLUSIONS OF LAW

A. Tax Law § 1441, which became effective March 28, 1983, imposes a 10% tax upon gains derived from the transfer of real property located within New York State. Tax Law § 1443(1)(a) provides for an exemption from gains tax when the consideration is less than the \$1,000,000.00 threshold.

B. Tax Law § 1440(7) defines "transfer of real property" in pertinent part, as follows:

"'Transfer of real property' means the transfer of any interest in real property by any method, including but not limited to sale, exchange, assignment . . . or acquisition of a controlling interest in any entity with an interest in real property."

C. The term "controlling interest" is defined in Tax Law § 1440(2), in pertinent part, to mean:

"(i) in the case of a corporation, either fifty percent or more of all the total combined voting power of all classes of stock of such corporation, or fifty percent or more of the capital, profits or beneficial interest in such voting stock of such corporation"

The same provision is found in the regulations at 20 NYCRR former 590.44. This regulation further provides that:

Thus, for purposes of the gains tax, in the case of a corporation which has an interest in real property, the acquisition of a controlling interest in the corporation occurs when a person or group of persons, acting in concert, acquires a total of 50 percent or more of the voting stock in such corporation. . . . Because the statute looks to the acquisition of a controlling interest, it is the act of the transferee which triggers the tax."

D. The Division argues that a transfer of shares in the corporation to Lane occurred on November 3, 1987, not on February 11, 1988. It contends that the record clearly shows that petitioner transferred his interest in the corporation on that date. In support of its contention, the Division refers to numerous documents which were prepared by petitioner subsequent to November 3, 1987 which state the date of the transfer of the corporation's shares as November 3, 1987.

E. Petitioner asserts that the shares of stock in the corporation were transferred to Lane on February 11, 1988. He argues that the contract which the shareholders and Lane entered into on November 3, 1987 provided "for the sale of the shares for a purchase price of \$1,675,000 payable \$300,000 upon signing of the agreement, \$75,000 at or prior to delivery of the deed for the subject real property and \$1,300,000 by an irrevocable letter of credit with certain specified payment terms" (Petitioner's brief, p. 2). Petitioner maintains that the contract contained conditions which had to be performed by Lane prior to the shareholders' being obligated to transfer their shares to him. He contends that the shareholders did not receive the \$300,000.00 down payment due on signing from Mr. Lane. Furthermore, he asserts that they did not receive a letter of credit nor was an escrow fund established in its place. Petitioner avers that the shareholders received no consideration on November 3, 1987 and no shares of the corporation

were in fact transferred on that date. He maintains that the agreement remained in an executory state as a result of Lane's failure to tender any part of the contract price.

Petitioner argues that the evidence clearly shows that subsequent to November 3, 1987, Lane believed that he only had the right to acquire the stock in the future. He further contends that documentary evidence in the record clearly supports his contention that the closing of the sale of shares of stock in the corporation occurred on February 11, 1988.

F. There is no dispute that the corporation had an interest in real property which would subject the transfer of the shares to the gains tax. The issue in this case is whether the transfer of the shares in the corporation to Lane took place on November 3, 1987 upon signing of the agreement as the Division contends, or on February 11, 1988 as petitioner contends. In support of its position, the Division relies upon the documents executed by petitioner subsequent to the agreement. Petitioner argues that the documentary evidence clearly establishes that the transfer took place on the latter date. Petitioner is correct, the record clearly indicates that Lane acquired a controlling interest in the corporation on February 11, 1988. The Division's reliance upon the documents executed by petitioner subsequent to the agreement is misplaced.

As noted in Conclusion of Law "C", it is the acquisition of the controlling interest by the transferee, in this case Lane, which triggers the tax. The November 3, 1987 agreement specifically stated what the obligations of both parties were. It is clear from the record that Lane did not perform his obligations under the November 3, 1987 agreement at that time. Inasmuch as the conditions precedent to the shareholders' transfer of the shares did not occur on November 3, 1987, the shareholders were not under any obligation at that time to transfer the shares to Lane and they did not do so. Therefore, on November 3, 1987, Lane had a right to acquire the shares in the future nothing more. Petitioner and the other shareholders continued to own the shares.

The November 3, 1987 agreement was subsequently modified by the parties on both January 4, 1988 and February 3, 1988 (see, Findings of Fact "16" and "18"). Throughout this time, the eight shareholders continued to own 100% of the corporation's stock. On February 10,

1988, the eight owners of record of the corporation's stock, including petitioner, executed the consent to sell Lane their shares in the corporation (see, Finding of Fact "19"). There is no evidence in the record that the shareholders consented to the sale prior to February 10, 1988. The special meeting of the board of directors took place on February 10, 1988, at which time the members passed a resolution to resign as both the directors and officers at the time of delivery of the \$375,000.00 payment by Lane (see, Finding of Fact "20"). Lane became the sole shareholder of the corporation on February 11, 1988 when the shareholders' consent and the directors' and officers' resignations were tendered to him upon the payment of \$375,000.00 (see, Finding of Fact "23"). At that time Lane acquired a controlling interest in the corporation which had an interest in real property, i.e., the purchase contract with Putnam.

The Division improperly determined the date of the transfer of the shares in the corporation. Lane acquired a controlling interest in the corporation on February 11, 1988.

G. 20 NYCRR former 590.47 provided as follows:

"(a) Question: Is the price paid for the ownership interest in an entity the consideration for a controlling interest used to calculate gain?

"Answer: Generally, no. Section 1440(1) of the Tax Law states that:

' . . . there shall be an apportionment of the fair market value of the interest in real property to the controlling interest to ascertain the consideration for the controlling interest.'

"(b) Question: How is the fair market value determined?

"Answer: Generally, by appraisal. It is the amount a willing buyer would pay a willing seller for the real property. It is not net fair market value, which deducts mortgages on the property from fair market value."

H. Tax Law § 1443 (former [1][b]) provides that:

"[i]n the case of an assignment of a contract to purchase real property, the amount required to be paid for the real property pursuant to the terms of the contract being transferred"

is to be included in consideration only for purposes of applying the \$1,000,000.00 exemption.

I. Tax Law § 1440(3) defines "gain" as the "difference between the consideration for the transfer of real property and the original purchase price of such property, where the consideration exceeds the original purchase price."

Tax Law § 1440(5)(a) defines "original purchase price" to mean:

"the consideration paid or required to be paid by the transferor

(A) to acquire the interest in real property"

"Consideration", in turn, is defined by Tax Law § 1440(1)(a) to mean:

"the price paid or required to be paid for real property or any interest therein . . . including payment for an option or contract to purchase or use real property. Consideration includes any price paid or required to be paid, whether expressed in a deed and whether paid or required to be paid by money, property, or any other thing of value and including the amount of any mortgage, purchase money mortgage, lien or other encumbrance, whether the underlying indebtedness is assumed or taken subject to."

J. Petitioner filed a claim for refund with the Division in November of 1989, the basis of which was that there was a reduction of \$950,000.00 in the amount of consideration that he had received (see, Finding of Fact "34"). In his refund claim, petitioner identified that the \$950,000.00 figure consisted of a scheduled payment of \$350,000.00, due on October 1, 1988 and a \$600,000.00 contingent payment due only when the subdivision plan for the real estate was approved by the Town of Putnam Valley. The Division subsequently denied his claim for refund in March of 1990 (see, Finding of Fact "36"). In his brief, petitioner argues that the Division erroneously denied his refund claim. He contends that the stock was transferred on February 11, 1988 pursuant to the agreement, as modified on January 4, 1988 and February 3, 1988, for a stated consideration of \$1,675,000.00, of which he received only \$725,000.00. Petitioner argues that according to the terms of the agreement as modified, \$600,000.00 of the stated consideration was contingent upon Lane's obtaining the necessary subdivision approvals from the Town of Putnam Valley, which Lane failed to obtain. In addition, he maintains that the scheduled payment of \$350,000.00, due on October 1, 1988 and which has never been paid, was an unsecured promise by Lane to pay money in the future.

Shortly before the hearing, petitioner filed an amended claim for refund with the Division. He submitted the original amended claim for refund into the hearing record (see, Finding of Fact "41"). In this amended claim for refund, petitioner argues that the consideration for the transfer of the contract right to acquire real property was in fact below \$1,000,000.00 and therefore, no real property transfer gains tax is due from him. He claims that the consideration which he received totalled \$725,000.00 and "any additional consideration was either (1) contingent upon a contingent event which never occurred or (2) of a value properly resulting in the \$1,000,000.00 threshold not being exceeded." Petitioner further claims that "any additional 'consideration' consisted of unsecured promises to pay money (which promises were made by an individual purchaser who declared bankruptcy) which were of no value whatsoever." Petitioner contends in his brief that the amended claim for refund should be approved as filed; however, if the amended claim for refund is not approved, he maintains that, at a minimum, the original claim for refund should be approved.

K. Petitioner argues that the purchase price of \$1,675,000.00 which was stated in the November 3, 1987 agreement is not the consideration he received for the transfer of the shares of the corporation and should not be used to determine the amount of gains tax due if any. He admits that he received \$725,000.00 -- \$375,000.00 on February 11, 1988 and \$350,000.00 in July of 1988. However, he contends that he never received the \$350,000.00 scheduled payment due on October 1, 1988 and that he never will because of Lane's discharge in bankruptcy. He also asserts that the \$600,000.00 payment is a contingent payment which will never occur because Lane never obtained the necessary subdivision plan approvals from the Town of Putnam Valley and also because the real property has been sold to the mortgage holder Bankers Trust. Petitioner also argues that the consideration he received for the transfer of the contract right to acquire real estate was in fact below the \$1,000,000.00 threshold and therefore no gains tax is due.

I will first address petitioner's argument that no gains tax is due because the consideration he received for the transfer of the contract right to acquire real property was in fact below

\$1,000,000.00. Petitioner contends that he received only \$725,000.00 for the shares in the corporation. This argument is without merit. As noted in Conclusion of Law "A", Tax Law § 1443(1)(a) does provide for an exemption from gains tax when the consideration is less than the \$1,000,000.00 threshold. However, for purposes of determining whether the exemption has been met, the consideration paid for the acquisition of the controlling interest includes the fair market value of the interest in real property (see, Conclusion of Law "G"). In the instant case, the interest in real property consists of the purchase contract. The fair market value of the purchase contract is the amount required to be paid for the real property pursuant to the terms of the contract (see, Conclusion of Law "H"; Matter of Auerbach v. State Tax Commn., Sup Ct, Albany County, March 27, 1987, Williams, J., affd 142 AD2d 390, 536 NYS2d 557). In this case, the amount required to be paid for the real property under the purchase contract is \$3,425,000.00, (see, Finding of Fact "5"). Using the amount which petitioner claims he received, \$725,000.00, and adding it to the fair market value of the interest in real property, the consideration for the acquisition of a controlling interest in the corporation for purposes of determining whether the transfer is exempt from the gains tax would be \$4,150,000.00. Therefore, this transfer is properly subject to the real property transfer gains tax.

L. I will next address whether the consideration for the transfer of the shares in the corporation should be reduced to reflect the reduction in consideration.

In Matter of Cheltoncort (Tax Appeals Tribunal, December 5, 1991, confirmed 185 AD2d 49, 592 NYS2d 121), the Tribunal stated that:

"In calculating the amount of tax due upon a taxable transaction, the value of the consideration has to be determined at the time of the transfer in order to finally fix the tax owed. Subsequent events do not alter the value that the consideration had at the time of the transfer" (emphasis added).

I have determined that the transfer of the shares of the corporation took place on February 11, 1988 (see, Conclusion of Law "F"). The last modification of the November 3, 1987 agreement, the letter of February 3, 1988 sets forth the terms of the payment of the purchase price of the corporation's shares (see, Finding of Fact "18"). Review of this letter indicates that the \$1,675,00.00 purchase price was to be paid in the following manner: (1) \$375,000.00 to be paid

at the closing of title between the corporation and Putnam; (2) \$350,000.00 to be paid no later than July 1, 1988; (3) \$350,000.00 to be paid no later than October 1, 1988 and (4) \$600,000.00 to be paid after final approval of a subdivision plan by the Town of Putnam Valley. There was no provision in the agreement as subsequently modified by the January 4, 1988 letter agreement and the February 3, 1988 letter concerning security for any of the scheduled payments. The agreement as modified contained only Lane's unsecured promise to pay.

Petitioner admits that he received \$725,000.00 of the stated consideration of \$1,675,000.00. However, he argues that the remaining \$950,000.00 of the stated consideration is not cash, rather this amount represents Lane's unsecured promises to pay money in the future. As noted above, the \$950,000.00 figure consists of a scheduled payment of \$350,000.00 and the \$600,000.00 contingent payment. Citing Matter of Old Farm Lake Co. (Tax Appeals Tribunal, April 2, 1992), petitioner contends that Lane's unsecured promises to pay money in the future should be valued at their actual value which he maintains was worthless once Lane was discharged in bankruptcy. Petitioner also contends that the \$600,000.00 contingent future payment is not required to be added to any known consideration as of the date of the transfer.

It is noted that the Division, in its brief, conceded that if the \$600,000.00 payment was determined to be contingent then petitioner is entitled to a reduction in consideration in the amount of \$600,000.00 (see, Finding of Fact "47"). Since the \$600,000.00 payment has been determined to be a contingent payment, petitioner is entitled to a reduction in consideration.

The Tribunal discussed the way to value promises to pay in the future in Old Farm Lake Co. (supra). In that decision, the Tribunal determined that promises to pay are included in the definition of consideration contained in Tax Law § 1440(1)(a) as "any other thing of value" and therefore the actual value of the promises is the consideration.

In this case, at the date of the transfer, Lane had given the down payment and was to make two additional \$350,000.00 payments, one by July 1, 1988 and the other by October 1, 1988, as well as a contingent payment of \$600,000.00. He made the July 1, 1988 scheduled payment; however, he failed to make either the October 1, 1988 scheduled payment or the

contingent payment. The Division asserts that the October 1, 1988 scheduled payment should be valued at \$350,000.00, while petitioner argues that the actual value is zero. Petitioner's argument is without merit; it is based upon a subsequent event, Lane's discharge in bankruptcy which occurred long after the February 11, 1988 transfer date. Arguably, the actual value of the October 1, 1988 scheduled payment on the transfer date may have been somewhat less than the face amount of \$350,000.00, inasmuch as the payment was to be made within eight months of the transfer. However, petitioner has not offered any method to determine the actual value of this scheduled payment. He has failed to prove that the actual value of the scheduled payment is less than the face value of \$350,000.00. On February 11, 1988, petitioner received consideration in the amount of \$1,075,000.00.

Petitioner is entitled to a reduction in consideration in the amount of \$600,000.00, the amount of the contingent payment.

M. In his original claim for refund, petitioner calculated the gains tax which would be due if the consideration was reduced by \$950,000.00 (see, Finding of Fact "34"). He requested a refund of tax paid in the amount of \$9,061.87 and the cancellation of the remaining installment balance of \$85,938.13. I have determined that the consideration should be reduced by \$600,000.00 (see, Conclusion of Law "L"). Inserting a reduction of \$600,000.00 in consideration into petitioner's calculation, rather than \$950,000.00 results in a gains tax due in this matter of \$68,908.80. Since petitioner paid \$42,970.67 in tax, he would still owe additional gains tax in the amount of \$25,938.13. The Division is directed to modify the notice of determination issued in this matter to reflect the recomputation of the gains tax due in this matter based on a reduction in consideration of \$600,000.00 and petitioner's payment of \$42,970.67 in tax.

N. Lastly, petitioner in his petition requested that a judgment of liability for attorney's fees and expenses in an amount to be determined be granted. There is no authority in the Tax Law or in the regulations promulgated thereunder for an award of attorney's fees or expenses in

any proceeding before the Division of Tax Appeals and petitioner's request therefore must be denied.

O. The petition of Peter H. McCallion is granted to the extent of Conclusion of Law "F", "L" and "M", and in all other respects is denied. The Notice of Determination (L-001537708) as modified by Conclusion of Law "M" is sustained. The original claim for refund is granted to the extent of Conclusion of Law "M" and in all other respects is denied; and the amended claim for refund is denied.

DATED: Troy, New York
March 7, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE